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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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ARIZONA CORPORATION COMMISSION,

Complainant,

v.

Docket No.: T-01051B-02-0871

QWEST CORPORATION,

Respondent.

STAFF'S CLOSING BRIEF

I. INTRODUCTION

The Arizona Corporation Commission ("Commission") Utilities Division ("Staff") submits the following post-hearing brief on the issue of Qwest Corporation's failure to implement ordered wholesale rates in a reasonable amount of time. Staff proposes that Qwest be fined for its failure to implement ordered rates in a reasonable amount of time, and that Qwest be ordered to provide evidence that it has implemented processes that will allow Qwest to implement future wholesale rate orders in a reasonable amount of time.

Qwest states that there was no intent on its part to not implement the ordered wholesale rates within a reasonable time and that the Competitive Local Exchange Carriers ("CLECs") were not harmed because Qwest "trued up" the excess charges with interest. But the evidence shows that Qwest intentionally created a system of implementation of wholesale rates that was cumbersome and unreasonably slow and that Qwest intentionally implemented wholesale rates ordered in states other than Arizona and subsequent to the Arizona order before implementing the Arizona rates. Further, Qwest knew that a delay in Qwest's implementation of the rates allowed Qwest to "borrow" the excess rates collected during the delay and would deny CLECs use of those monies until refunded or credited by Qwest. In addition, the evidence shows that Qwest's wholesale rate implementation

1 system does not allow Qwest to implement the wholesale rates it charges CLECs in parity with the
2 amount of time in which Qwest implements rates for its own retail use.

3 Qwest opines that it could not practically begin rate implementation until after the filing of the
4 required Notice of Compliance. However, Qwest made no effort to make reasonable preparations for
5 implementation of the wholesale rates prior to its filing of the required Notice of Compliance. Such
6 preparations could have significantly decreased Qwest's implementation time. Qwest argues that the
7 actions it has recently taken to improve its implementation processes should be taken into account by
8 the Commission and that fines should not be levied. Staff believes that because the evidence shows
9 that Qwest knew its implementation system would not allow for the implementation of wholesale
10 rates within a reasonable time, and took no corrective action to improve its processes, fines are
11 appropriate. Qwest urges that the Commission should not now require proof that its system changes
12 will allow for timely implementation of future wholesale rates, but that the Commission should wait
13 to evaluate Qwest's implementation system until Qwest's implementation of some future wholesale
14 rate order. Staff believes the Commission's approach should not be "wait and see," but should be
15 proactive, ensuring Qwest's future compliance.

16 Qwest argues that because no party objected to its taking over one year to implement prior
17 Commission wholesale rate orders, the Commission should not take action for its current failures.
18 Staff finds this argument without merit. In effect, Qwest is arguing that because it took an
19 unreasonable amount of time to implement rates in a prior proceeding, it should not be required to
20 implement rates in a reasonable amount of time in this proceeding. The argument is further
21 weakened when considered with Qwest's urging the Commission to "wait and see" how it performs
22 in implementing the Commission's next wholesale rate order. Having failed twice to implement rates
23 within a reasonable time, Qwest now asks the Commission to take no action for this most recent
24 failure and to evaluate its systems on the next go around. Qwest's requests should be flatly rejected
25 by the Commission.

26 ...

27 ...

28 ...

1 **II. DISCUSSION**

2 **A. The Language of Decision No. 64922 Ordered the Rates To Be Effective**
3 **Immediately and Required the Rates Be Implemented within a Reasonable Time.**

4 The ordering paragraphs of the decision state, "[i]t is further ordered that the rates and charges
5 approved herein shall be effective immediately. It is further ordered that this decision shall become
6 effective immediately." (Decision No. 64922; Tr. at 47). Qwest argues that the order does not
7 support the conclusion that the rates were to be implemented immediately because the order directs
8 that the rates be effective immediately rather than be implemented immediately. (Ex. Q-1 at 15).
9 Qwest's interpretation would allow Qwest to delay implementation of any rate order not specifying
10 an implementation date to whenever Qwest desired to implement the rates. Staff believes that the
11 order's language is properly interpreted to mean the rates are to be implemented immediately or
12 implemented within a reasonable period of time. Of course, the requirement that rates be
13 implemented within a reasonable time begs the question, "what is a reasonable amount of time in
14 which to implement wholesale rates?"

15 **B. A Reasonable Period of Time in which to Implement Wholesale Rates Is Thirty**
16 **to Sixty Days.**

17 Experience shows that a six month implementation time would not be considered a reasonable
18 amount of time in any other state throughout the country. (Tr. at 60). Staff, having considered the
19 amount of time Qwest takes to implement retail rates, Qwest's wholesale rate implementation time in
20 other Qwest states, the wholesale rate implementation time of other RBOCs and Staff's own
21 assessment of the work involved in implementing the rates, concludes that no definition of the term
22 "reasonableness" would allow Qwest to take six months to implement wholesale rates. (Tr. at 46). A
23 CLEC would expect to see wholesale rate changes on their next bill or the bill thereafter, i.e.,
24 between 30 and 60 days. Id. Bell South, Verizon, and SBC all implement and show changed rates on
25 bills within 30 to 60 days. Id. Therefore, Staff believes that where no firm implementation date is
26 given in the order, 60 days is reasonable. (Tr. at 15).

27 Perhaps more importantly, Qwest itself readily admits it should normally take no more than
28 60 days to complete implementation of ordered wholesale rates and that its own processes negated its
ability to do so. (Ex. Q-1 at 5-8). The rates ordered by the Commission to be effective June 12, 2002

1 were not implemented until mid-December, 2002. This period of time is much longer than
2 considered reasonable by Qwest, Staff, or taken by any other RBOC for the CLECs it serves.

3 **C. The Wholesale Rate Implementation System Design Used by Qwest to Implement**
4 **these Rates Was Unreasonably Cumbersome and Time Consuming.**

5 Qwest "acknowledges the role it played in creating" the delay in its rate implementation. *Id.*
6 at 5. One of the major factors in delaying implementation of the rates was Qwest's own system
7 design. Qwest's wholesale rate implementation process involves three and in this case four time-
8 consuming phases. *Id.* The first three phases – the initiation, the contract implementation and the
9 I.T. rate implementation phases – are estimated by Qwest to take an average of 60 days. *Id.* at 6-8.
10 Here, it took Qwest six months to implement rates. Qwest took an average of 114 days to implement
11 rates in seven states other than Arizona. (Ex. S-1 at 9). Qwest did nothing to improve its admitted
12 inadequate implementation system until after the Commission became aware of the length of the time
13 Qwest takes to implement rates. Qwest did nothing to facilitate timelier implementation of the rates
14 under its current system. Importantly, Qwest gave low priority to implementation of Arizona's
15 wholesale rates, even though those rates had an earlier effective date than other states. All of these
16 actions and omissions are unreasonable.
17

18
19 **1. Qwest's Prioritization of States for Implementation of Wholesale Rates**
20 **Was Unreasonable.**

21 Qwest's responses to Staff data requests indicate that Qwest prioritized its implementation of
22 wholesale rate changes according to whether or not Qwest had a 271 application pending at the
23 federal level for that state, rather than according to the ordered effective date of the rates in the states.
24 *Id.* at 5, attachment B. Qwest filed for Section 271 approval for Colorado, Idaho, Indiana, Montana,
25 Nebraska, North Dakota, Utah, Washington, and Wyoming on September 30, 2002. *Id.* at 10. These
26 states also had wholesale rate implementation proceedings pending. The average time to implement
27 wholesale rates in these states was 70 calendar or 51 business days. *Id.* at 10-11, table 2. In six of
28 these cost dockets, the effective date of the ordered rates was *after* June 12, 2002, the effective date

1 of the Commission's order. Id. at 11. It could be concluded that Qwest's management directed that
2 states with Section 271 approval pending were to be given priority over Arizona. While Qwest's
3 claim that the implementation of rates in these other states may have been less complex than
4 implementation of the Arizona order may be of some merit, it is apparent resources were diverted
5 from Arizona to these other states in order to support the Section 271 applications. Qwest's
6 prioritization and diversion of resources from implementation of Arizona's ordered rates is
7 unreasonable.

8 **2. Qwest's Lack of Planning for Implementation of the Wholesale Rates Was**
9 **Unreasonable.**

10 Qwest claims its wholesale rate implementation process' complexity is a result of having to
11 implement a large number of elements and multiple billing systems, and that the changes must be
12 made on a CLEC by CLEC basis. (Ex. Q-1 at 9). Qwest goes on to complain that because "existing
13 contracts with CLECs have been negotiated and arbitrated at various points in time since the passage
14 of the 1996 Telecommunications Act "contractual provisions and structure concerning rates varies."
15 Id. Qwest states that "each contract must be analyzed to determine how the change impacts that
16 particular contract." Id. Qwest points outs that interconnection agreements may "have different
17 product names or rate elements than those identified in the" Commission decision. Id. Qwest claims
18 all of these challenges combined necessitated a review of each individual CLEC contract to properly
19 determine application of the order which made the implementation "significantly more complicated
20 than merely changing rates in a table." Id. Qwest fails to explain why these challenges could not be
21 met prior to the rate tables being filed or even prior to the final Commission order being issued.

22 Staff believes Qwest could have and should have begun its review of the affected agreements
23 well before the order was finalized. Qwest claims that it is how the element "is being described" in
24 different interconnection agreements that makes the mapping process intolerably lengthy. (Tr. at 94).
25 But it is, of course, Qwest itself that has defined and redefined elements in its interconnection
26 agreements and has called the elements by different names. Id. Qwest knew or should have known
27 which rates were likely to be affected by the impending order and should have begun reviewing its
28 interconnection agreements and its mapping of product name and rate elements in anticipation of the

1 order. (Ex. S-2 at 1-2).

2 Qwest should have identified a process allowing for easier and timelier mapping of rate
3 elements into interconnection agreements. While network elements may be referred to by different
4 names in different interconnection agreements, there have been no real network elements created
5 since 1996. Therefore, a spreadsheet could have been created that was inclusive of all elements
6 purchased from Qwest by CLECs regardless of the nomenclature given them in different agreements.
7 Then, the spreadsheet could be referenced rather than a manual review of each agreement. Other
8 RBOCs with CLEC specific rate tables, such as those of which Qwest complains, create such a
9 spreadsheet to facilitate timelier implementation of wholesale rates. Id. at 61. Qwest's responses to
10 Staff's data requests show that Qwest could have began the implementation process prior to all exact
11 rates being known. Id. at 29. Staff believes Qwest's failure to use such a simple tool, or some
12 similar tool, indicates a lack of concern for the timely implementation of the wholesale rates.

13 In fact, Qwest has now, after the fact and too late, implemented mechanized solutions that
14 shorten the time it takes to map into the individual CLEC contracts. Id. at 92. In addition, Qwest is
15 now beginning the implementation process by having a meeting following the hearing but before the
16 final order issues to begin a discussion of what will be involved in implementation. Id. at 94. While
17 Staff does not wish to discourage Qwest's remedial efforts, it must point out that Qwest itself has
18 found ways of overcoming its challenges in wholesale rate implementation. Unfortunately, it has
19 done so too late to implement the rates in Decision No. 64922 within a reasonable amount of time.

20
21 **3. Qwest's Statement of the Amount of Work Necessary to Implement
Wholesale Rates Is Unreasonable.**

22 Qwest claims that it was required to make changes for 126 CLECs and 11 wireless providers.
23 (Ex. Q-1 at 11). Qwest also claims that there were 547 rate elements involved in the Arizona Cost
24 Docket implementation. Id. at 10. However of the 126 CLECs certificated to do business in Arizona
25 only 78 are certified as facilities based providers. (Ex. S-2 at 2; Tr. at 17-18). Therefore, Qwest
26 needed to review only 78 of its interconnection agreements and not 126. Regardless, the Commission
27 should not accept an argument from Qwest that the complexity of an order releases Qwest from its
28

1 responsibility to implement rates in a reasonable amount of time. While the complexity of the order
2 may work to determine what a reasonable amount of time is, six months is beyond reason for the
3 implementation of any rate order, and 30-60 days is a reasonable time in which to implement any rate
4 order regardless of complexity. Staff believes Qwest's failure to take any measures to ensure timely
5 implementation of the rates coupled with its exaggeration of the amount of work to be done in
6 implementation illustrates an intent on Qwest's part to delay rate implementation.

7
8 **4. Qwest Intentionally Did not Implement the Rates Ordered In Commission**
9 **Decision No. 64922 within a Reasonable Amount of Time.**

10 Qwest on one hand, states that it accepts responsibility for the delay in implementation. (Ex.
11 Q-1 at 5). On the other hand, Qwest states its conduct was not intentional. Id. The evidence shows
12 that Qwest's actions belie intent to delay implementation of the rates.

13 Ordering Paragraph 5 of Decision No. 64922 provided that the rates and charges approved
14 therein were effective immediately, i.e., on June 12, 2002. Qwest did not implement the rates until
15 December 15, 2002. Id. at 4. This is a full 135 business days after the effective date of the order.
16 (Ex. S-1 at 5). This length of time that is by any one's account, including Qwest's, unreasonable.
17 Qwest prioritized states ahead of Arizona, even though Arizona's order had an earlier effective date.
18 Qwest did nothing to expedite the process of implementation. Qwest waited to begin mapping
19 elements into agreements until after the Notice of Compliance and price list had been filed, when it
20 could have begun the process even before the order issued. Qwest made no efforts to mechanize its
21 processes until it was too late to aid timely implementation of these rates. Qwest made no effort to
22 notify either the Commission or the affected CLECs of its inability to implement the rates within a
23 reasonable time. Qwest did not seek relief from the Commission by filing for an extension of time to
24 implement the rates. Qwest simply allowed the Commission to believe that its order was being
25 implemented. In fact, the Commission only became aware that the rates had not been implemented
26 when on October 7, 2002, AT&T filed a copy of a letter it had sent to Qwest inquiring as to why it
27
28

1 was still being charged the old wholesale rates that had been superseded by Decision No. 64922.
2 (Ex. S-3, attach. A). Qwest responded to AT&T that the implementation of the rates ordered into
3 effect on June 12, 2002 was being dealt with as quickly and efficiently as possible and would be
4 completed sometime in mid-December, 2002. (Ex. S-3, attach. B). The letter also admonished
5 AT&T for having provided a copy of the letter to the Commission. Not only did Qwest not notify the
6 Commission of its inability to implement rates in a reasonable time, but it took objection to a CLEC
7 doing so. Qwest admits its processes were inadequate and that it did not implement the ordered rates
8 within a reasonable amount of time. (Ex. Q-1 at 5). These actions and omissions clearly indicate
9 Qwest intended to delay implementation of the rates. At the very least, the actions and omissions
10 show Qwest did not intend to implement the rates within a reasonable amount of time.
11

12
13 **E. The Commission Should Fine Qwest for Its Failures in Implementation of the**
14 **Rates Approved in Decision No. 64922.**

15 The Commission has the authority to fine Qwest for contempt under A.R.S. § 40-424. The
16 statute gives the Commission the authority to fine “[i]f any corporation or person fails to observe or
17 comply with any order, rule, or requirement of the commission....” A.R.S. § 40-424.A. The fine
18 amount may be “not less than one hundred nor more than five thousand dollars, which shall be
19 recovered as penalties.” *Id.* Qwest’s actions and omissions in implementing the rates ordered in
20 Decision No. 64922 constitute contempt of the Commission’s order. Staff believes Qwest’s delay in
21 implementation of the rates to be intentional, although Qwest denies intent. However, the
22 Commission’s ability to fine is not dependent on an ability to prove Qwest’s intent. The contempt
23 statute contains no language making a finding of intent a prerequisite to the Commission exercising
24 its ability to fine for contempt.

25 **1. The Commission Should Fine Qwest for Its Failure to Notify the**
26 **Commission of Its Rate Implementation Delay and Failure to Obtain**
Approval of the Delay.

27 By not notifying and obtaining approval of delayed implementation of the rates ordered to be
28 effective on June 12, 2002, Qwest was in contempt of the Commission’s order for a total of 126 days.

1 These 126 days represent the time between August 11, 2002 and December 15, 2002, the date the
2 rates were implemented. (Ex. S-1 at 14). August 11, 2002 is the date 60 days after the ordered
3 effective date. Staff chooses this date because Qwest and Staff agree that sixty days is the normally
4 scheduled and reasonable period of time in which to implement cost docket rates. Id. Under A.R.S.
5 § 40-424 the minimum fine amount available to the Commission for holding Qwest in contempt for
6 126 days is \$12,600, the maximum amount is \$630,000.

7 Staff recognizes Qwest has made efforts to retroactively remedy this situation. These efforts
8 include crediting with interest the overcharges to CLECs from the effective date of the order until
9 December 15, 2002. Staff therefore recommends a fine of \$750 per day totaling \$94,500 be assessed
10 against Qwest for its failure to notify the Commission of and gain Commission approval for its rate
11 implementation delay.

12 **2. The Commission Should Fine Qwest for Its Unreasonable Prioritization of**
13 **States ahead of Arizona with Wholesale Rate Orders to be Implemented.**

14 Rate changes for the nine states that had pending Section 271 applications with the Federal
15 Communications Commission ("FCC") were implemented much faster than the Arizona rates. Many
16 of these states' orders had effective dates later than Arizona's effective date. Resources that should
17 have been devoted to the Arizona implementation process were diverted to the implementation of
18 rates in the nine states. Because Qwest had Section 271 approvals pending in these states, it had an
19 incentive to get them done quickly in order to avoid any negative consequence to Qwest's
20 applications. Qwest's diversion of resources from Arizona's order to make the rates effective
21 immediately constitutes contempt of the Commission.

22 As discussed above, the period in which Qwest was in contempt is 126 days. The maximum
23 fine available to the Commission is \$630,000. Staff recommends a fine of \$750 per day totaling
24 \$94,500 for Qwest's unreasonable prioritization of state rate implementation.

25 In summary, Staff has taken into account the fact that Qwest has refunded overcharges,
26 admits its failure to notify the Commission of the delay was inappropriate, and is reexamining its rate
27 implementation process with the intent of making improvements. Staff is therefore recommending
28 less than the maximum fine amount available. Staff is recommending a total monetary penalty of

1 \$189,000, representing \$94,500 in fines for Qwest's failure in notify the Commission of and obtain
2 approval for its delay in implementing the rates, and \$94,500 for Qwest's unreasonable prioritization
3 of state implementation resulting in diversion of resources from implementation of Arizona's rates.

4 **D. The Commission Should Order Qwest to Adopt Processes That Allow Qwest to**
5 **Implement New Wholesale Rates within Thirty Days.**

6 Qwest has acknowledged that its current implementation process is inadequate and has begun
7 to examine ways to improve that process. Staff recommends that Qwest be ordered to implement
8 billing and systems process changes that will allow it to implement wholesale rates within 30 days.
9 The changes should be implemented within four months of a decision in this docket. Qwest should
10 be required to employ an independent auditor to evaluate and verify that the changes made by Qwest
11 are effective in allowing Qwest to implement wholesale rate changes within 30 days. Such a
12 requirement will ensure that Qwest will have the capability of implementing future wholesale rate
13 changes in a reasonable amount of time.

14
15 RESPECTFULLY SUBMITTED this 15th day of July, 2003

16 ARIZONA CORPORATION COMMISSION

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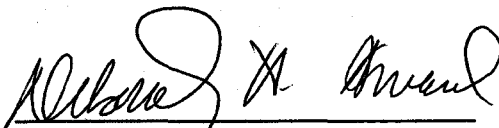
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